Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-743

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROSEMARY ECKERSLEY and ESTATE OF DR. FRANKLIN ASHLEY, by ROSEMARY ASHLEY (ECKERSLEY), Executrix,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ROBERT J. STUMFF, JR.
JOSE H. GARCIA
Bronson, Bronson & McKinnon
505 Montgomery Street
San Francisco, CA 94111-2514
(415) 986-4200

SHELDON S. COHEN *
PETER BUSCEMI
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-743

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, by
ROSEMARY ASHLEY (ECKERSLEY), Executrix,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The government's brief in opposition attempts to assume away the issue in this case. The government *assumes* that there was a valid agreement between the parties and that the only matter in dispute is the content of that agreement. Hence, the government lectures the Court about "basic principle[s] of contract interpretation", and cites cases concerning the circumstances in which parol evidence may be used in interpreting a contract. Br. in Opp. 7.

But this response misses the point. The issue in the case is whether there could be *any* valid agreement to waive the statute of limitations, in the absence

of a mutual understanding regarding the terms and scope of that waiver. The IRS admitted in the district court—and the government does not deny here—that the parties "had no clear understanding at all as to whether the 872-A waiver would be restricted or not." Gov't Mem. 22. These are the government's words, not petitioners'. The IRS further admitted that its revenue agent, Mr. Zakahi, and petitioners' representative, Mr. Brown, were talking about "two completely different things" when they exchanged correspondence at the time the Form 872-A was signed. *Id.* If the course of dealings between the parties left any doubt about the lack of mutual understanding (and petitioners do not believe that it did), that doubt was removed by the IRS's own admissions.

This case therefore squarely presents the important legal issue set forth in the petition—not how to interpret an allegedly unambiguous waiver, but whether any valid waiver can be obtained in the absence of a mutual understanding as to its terms. Having admitted the critical facts, the government nevertheless ignores the obvious conclusion: there was no mutual assent, and thus no waiver.

The government's contrary approach produces an incongruous result. All parties agree that an agreement is a prerequisite for a valid waiver. The Internal Revenue Code so provides, as the government acknowledges. Br. in Opp. 6. All parties further agree that the IRS and petitioners reached no clear understanding as to the scope of any waiver. And yet, according to the government, the upshot is a totally unrestricted waiver, notwithstanding the ordinary contract principles of offer and acceptance. This is not and cannot be the law.

The authorities cited by the government are inapposite. They all deal with situations in which the parties accept the existence of a binding agreement but dispute the agreement's terms. In *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988), for example, the court construed a contractual forum selection clause and determined whether the clause applied to the kind of claims made in the complaint. The parties agreed that the clause was binding; they disagreed only about how it should be applied to particular claims. Likewise, in *Press Macinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984), the parties did not deny the existence of a valid settlement agreement; they argued only about whether that agreement gave one party a license to use a patent issued to the other. These cases do not support the proposition that petitioners and the IRS entered into a valid waiver agreement here.

Similarly inapposite is the government's discussion of whether the exchange of correspondence between Revenue Agent Zakahi and Mr. Brown had the effect of modifying, conditioning, or restricting the alleged waiver. Br. in Opp. 8-9. Again, the government attempts to assume away the issue. The question is not whether a waiver was modified, but whether there was any valid waiver at all.

In the district court, petitioners sought summary judgment, arguing not only that there was no valid waiver but also that if there *was* any agreement between the parties, it had to be limited to the Harvest partnership, because that was the only subject that was mentioned in the government's waiver solicita-

tion and petitioners' response.[1] The IRS responded by conceding that there was "no clear understanding at all" as to the scope of the alleged waiver. That concession should have been fatal to the government's case. It meant that the government could not carry its burden of showing a valid waiver of the statute of limitations.

The government's effort now to avoid the real issue demonstrates the importance of the question presented here and the need for review in this Court. Establishing clear prerequisites for a valid waiver of the statute of limitations is a matter of enormous practical importance for the day-to-day administration of the Internal Revenue system and for assuring fundamental fairness to taxpayers in IRS proceedings.

As petitioners observed in the district court, Revenue Agent Zakahi conceded in his deposition testimony (made a part of the record below) that his waiver solicitation letter specifically referred to Harvest Partners as a means of persuading petitioners to execute the Form 872-A. Agent Zakahi further conceded that nothing in his letter would have suggested to petitioners that any subject other than the Harvest partnership would be covered by the waiver that was being sought.[2] Under these

---

[1] Contrary to the suggestion in the final footnote of the government's brief, petitioners have not "abandoned this position." The petition simply focused on the important legal question, which is whether there can be any valid waiver at all in the absence of a mutual understanding as to its terms and scope.

[2] The relevant testimony, referring to Agent Zakahi's February 17, 1982 waiver solicitation letter, reads as follows (Zakahi Depo. 94):

circumstances, the government should not be permitted now to insist that the Form 872-A was an unconditional waiver that shifted to petitioners the burden of showing some restriction or modification. Rather, by the IRS's own admission, the government failed to reach a clear understanding with petitioners at the time the Form 872-A was signed. The absence of such an agreement necessarily negates the existence of a valid waiver, and the Court should grant review to establish that proposition.

For these reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. STUMPF, JR.
JOSE H. GARCIA
Bronson, Bronson & McKinnon
505 Montgomery Street
San Francisco, CA 94111-2514
(415) 986-4200

SHELDON S. COHEN *
PETER BUSCEMI
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* *Counsel of Record*

January 15, 1993

Q. And you're not telling the taxpayer that there's any other reason other than Harvest in this letter, are you?

A. Yeah.

Q. Is that correct?

A. Yes.

Q. Is there anything in your February 17th letter which suggests as you read the letter to the taxpayer's representative that the audit is going to remain on for anything other than Harvest?

A. No.